

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM RAYEL WATLEY,

Defendant-Appellant.

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UNPUBLISHED

January 17, 2003

No. 235132

Jackson Circuit Court

LC No. 01-000201-FC

Before: Murray, P.J., and Sawyer and Fitzgerald, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions for assault with intent to do great bodily harm less than murder, MCL 750.84, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced as a second habitual offender, MCL 769.10, to three to fifteen years' imprisonment for the assault with intent to do great bodily harm conviction and two years' imprisonment for the felony-firearm conviction. We affirm.

**I. Basic Facts and Procedural History**

The facts presented at trial established the following scenario. During the early morning hours of July 5, 2000, defendant pulled up in his car next to the victim, Brian Bicy, because he wanted to talk to Bicy. Bicy was driving with three other passengers in his car, Roy Guy, Seth DeMyers, and Daryl Palmer. Guy was seated in the front passenger seat, while DeMyers and Palmer sat in the back seat. Bicy owed defendant \$200 from a prior cocaine sale and defendant wanted Bicy to pull over so they could talk. Defendant was shouting stuff to Bicy, like "where's my mother funk'n' [sic] money." Bicy observed a black gun on the armrest in defendant's car. The music in Bicy's car was loud so Bicy turned the music down so he could hear what defendant was saying, but Guy turned it back up again. Guy then shouted, "f--- you bitch" in reference to defendant, and then gunshots were fired from defendant's car into Bicy's car, breaking out the rear passenger window. DeMyers and Palmer got out of the car and ran when they heard the shots and Guy pushed the gas pedal and drove away with Bicy. Bicy was hit with a bullet and spent four days in the hospital. Bicy, Guy, DeMyers, and Palmer denied having a gun in the car or seeing anyone in the car with a gun.

Defendant was arrested in December 2000 and made a statement to the police after waiving his *Miranda*<sup>1</sup> rights. Defendant stated that he was guilty of being involved in the shooting, but that it was spontaneous. According to defendant, Bicy and his friends pulled up next to him at the stop sign, Bicy pointed his finger at defendant, and Bicy's friends bobbed their heads. As a result, defendant felt threatened. It then appeared to defendant that Bicy and his friends were getting out of the car, so defendant started shooting at them.<sup>2</sup> Following a jury trial, defendant was convicted of assault with intent to do great bodily harm and felony-firearm.

## II. Instructional Error

Defendant first claims that the trial court reversibly erred when it gave a self-defense instruction that omitted the "serious physical injury" aspect of self-defense. However, because defendant expressly acquiesced to the jury instructions as given, defendant has waived any error on appeal. *People v Carter*, 462 Mich 206, 214-216; 612 NW2d 144 (2000). It is well established that one who waives his rights before the trial court may not then raise it as an error on appeal, for his waiver has extinguished any error. *Id.* (citations omitted). Accordingly, reversal on this basis is not required.

## II. Ineffective Assistance of Counsel

Defendant also argues that he was denied the effective assistance of counsel when his trial counsel failed to object to the erroneous self-defense instruction given by the trial court. We disagree. Because there was no *Ginther*<sup>3</sup> hearing, our review of this issue is limited to mistakes apparent on the existing record. *People v Avant*, 235 Mich App 499, 507; 597 NW2d 864 (1999).

In order for this Court to reverse an otherwise valid conviction due to the ineffective assistance of counsel, the defendant must establish that his counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and that the representation so prejudiced the defendant that, but for counsel's error, the result of the proceedings would have been different. *People v Noble*, 238 Mich App 647, 662; 608 NW2d 123 (1999), citing *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *Id.*

The jury was instructed regarding self-defense as follows:

First, at the time he acted, the Defendant must have honestly and reasonably believed that he was in danger of being killed. If his belief was honest

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<sup>1</sup> *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

<sup>2</sup> Defendant also claimed that there was a previous confrontation with Bicy and that Bicy had a group of guys after him, telling him to stay away from Bicy. There was nothing in the record, however, to indicate that the occupants were armed with any type of weapon, nor is there any evidence that any of the occupants actually exited the vehicle before defendant shot at the car.

<sup>3</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

and reasonable, he could act immediately to defend himself even if it turned out later that he was wrong about how much danger he was in. In deciding if the Defendant's belief was honest and reasonable, you should consider all the circumstances as they appeared to the Defendant at the time.

Second, a person may not kill or seriously injure another person just to protect himself against what seems to – seems like a threat of only a minor injury. The Defendant must have been afraid of death. When you decide that the Defendant was afraid of one or more of these, you should consider all the circumstances, the condition of the people involved, including their relative strength, whether the other person was armed with a dangerous weapon, or had some other means of injuring the Defendant, the nature of the person's attack or threat or the Defendant knew about any previous violent acts or threats made by the other person.

Third, at the time he acted, the Defendant must have honestly and reasonably believed that what he did was immediately necessary. Under the law, a person may only use as much force as he thinks is necessary at the time to protect himself. When you decide whether the amount of force used seemed necessary, you may consider whether the Defendant knew about any other ways of protecting himself, but you may also consider how the excitement of the moment affected the choice the Defendant made.

By law, a person must avoid using deadly force if he can safely do so. If the Defendant could have safely retreated but did not do so, you can consider that fact along with all of the other circumstances when you decide whether he went farther in protecting himself than he should have. However, if the Defendant honestly and reasonably believed that it was immediately necessary to use deadly force to protect himself from an immediate threat of death, the law does not require him to retreat. He may stand his ground and use the amount of force he believes necessary to protect himself.

In reviewing the standard criminal jury instructions, it is clear that the trial court omitted the phrases "seriously injured" and "serious physical injury" from the self-defense instruction when they were applicable to defendant's theory of the case. See CJI2d 7.15; *People v Bartlett*, 231 Mich App 139, 143; 585 NW2d 341 (1998). However, even assuming that trial counsel's performance was unreasonable in failing to object to the trial court's instruction, defendant has failed to establish that he was prejudiced by such error. *Noble, supra*. We are not persuaded that the failure to instruct on the serious physical injury element of self-defense affected the outcome of the proceeding or that, but for trial counsel's error, the result of the proceedings would have been different. *Id.*

The Michigan Supreme Court has recently clarified the law regarding self-defense:

As a general rule, the killing of another person in self-defense by one who is free from fault is justifiable homicide if, under all the circumstances, he honestly and reasonably believes that he is in imminent danger of death or great bodily harm and that it is necessary for him to exercise deadly force. The

necessity element of self-defense normally requires that the actor try to avoid the use of deadly force if he can safely and reasonably do so, for example by applying nondeadly force or by utilizing an obvious and safe avenue of retreat. [*People v Riddle*, 467 Mich 116, 119; 649 NW2d 30 (2002) (footnotes omitted).]

However, a person is never required to retreat from a sudden, fierce, and violent attack, nor is he required to retreat from an attacker who he reasonably believes is about to use a deadly weapon. *Id.* In these circumstances, he may stand his ground and meet force with force. *Id.*

In light of the evidence presented at trial, including defendant's statement, no reasonable juror could have concluded that defendant was justified in shooting Bicy in self-defense. Rather, we are convinced that defendant could have safely and reasonably avoided using deadly force by simply driving away. There was no evidence that the threat defendant allegedly perceived from Bicy, Guy, DeMyers, and Palmer was immediate, sudden, fierce, or of a violent nature, justifying the use of deadly force. See *id.* Indeed, the only justification for the shooting offered by defendant was that he thought the occupants of the other car were going to exit the vehicle, but there was no evidence that they did or that the occupants had any type of weapon. This lack of evidence supporting a self-defense theory convinces us that had counsel objected, it would not have resulted in a different outcome.

Moreover, the evidence of defendant's guilt was overwhelming, as the prosecution's evidence established that defendant pulled up next to Bicy's car at the stop sign, asking Bicy for the money, and then opened fire. Further, Bicy, Guy, DeMyers, and Palmer all denied having a gun or seeing a gun in Bicy's car. Under these circumstances, trial counsel's failure to object to the trial court's instruction regarding self-defense did not constitute ineffective assistance of counsel.

Affirmed.

/s/ Christopher M. Murray  
/s/ David H. Sawyer  
/s/ E. Thomas Fitzgerald